In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
ARTHUR LYNAH ET AL. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS. } No. 59.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

PETITION OF THE UNITED STATES FOR REHEARING.

We submit hereby the petition of the Government for rehearing in these cases. The request is made with especial earnestness, because of the unusual gravity of the main question. A vital and extensive function of the Government is involved. Its exercise is affected by fundamental challenges, or, at least, would be followed by practical consequences having the same effect in restriction and impairment. It is manifest that the result of the decision of the court will be very far-reaching; that it will influence momentously interior waters and waterways and boundary waters, as

well as coast and tidal waters throughout the length and breadth of the land.

The scope of the Government's constitutional power over commerce and navigation, and the extent of one of the most important guaranties to the people, are drawn in question by a conflict which invokes comparative scrutiny and justifies great deliberation.

We add brief observations on particular points:

First. It appears from the opinion of the court that neither in the court below nor on the first argument here was the question of jurisdiction presented or considered. The opinion intimates that this omission is significant. Without suggesting that the question has not now been carefully argued, it has only been once argued. For this reason, then, and because the point of jurisdiction is so intimately connected with the merits, we desire to present that question again to the court in more detail.

Second. Further—and this is a matter of some delicacy—the court say that the Government conceded on the argument that "so far as respects *the mere matter of overflow and injury* there was no substantial distinction" between the Pumpelly case and the present cases.

Avoiding the intimation that there was any misapprehension between court and counsel at that stage—a misunderstanding, inadvertent, of course, if it occurred—we deem it our duty to state that the United States did not intend to grant, and must now explicitly decline to make any such concession.

Third. We are aware that the opinion of the court construes the findings of fact below with determinative effect; yet it is so essential that the accuracy of the crucial fact as to the manner and extent of the "taking" should be recognized beyond all doubt that we submit as follows:

The opinion says: "But Findings IX and X show that both by seepage and percolation through the embankment and an *actual flowing upon the plantation above the obstruction* the water has been raised in the plantation about 18 inches," etc. We assume that in this passage the word "obstruction" is equivalent to "embankment," and that the phrase "above the plantation" means "over the embankment." But Finding IX merely locates the plantation as above "these obstructions," referring to the Government dams and walls lower down the river; and Finding X states that the water "has been *backed up against* the embankment;" and when it also says, "has been caused to flow back upon and in this plantation above the obstruction," the reference is again to the "obstruction" or "obstructions" of the Government works below the plantation. The undoubted finding that the "lift" above mean low water was from 12 to 15 inches necessarily requires this view, we think. We contend, therefore, with respect, that the purport of the court's finding and the fact simply is that the waterways and ditches were not drained; that the words "invaded" and "flooding" relate merely to this feature and to percolation through the

levees or embankments, and by no means imply an actual flowing upon the land over the top of the embankment, or actual submersion of the body of the property to the depth of 18 inches. See also Finding XII, which is: "beyond the *backing up* of the water on and in the plantation by reason of the dams and *obstruction*, and the *invasion* of these lands by *this* super-induced addition of water, * * * the United States is not in actual possession," etc. It seems that overflow, throughout the consideration of the cases, has been used in two or three different meanings. The overflow of land and of embankment are entirely different things.

Having in mind the foregoing considerations, we suggest that additional argument before all the justices is eminently proper and, indeed, necessary. We therefore ask with all becoming urgency, on behalf of the United States, for an opportunity to argue again the important questions in issue.

P. C. KNOX,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

We hereby certify that in our opinion the foregoing petition states a correct distinction under the findings of fact, and is therefore well founded in point of law.

P. C. KNOX,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

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